No. 23-625

In the Supreme Court of the United States

TEL JAMES BOAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
NICOLE M. ARGENTIERI
Acting Assistant Attorney General
PAUL T. CRANE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether sufficient evidence supported petitioner's convictions for attempting to sexually exploit a minor, in violation of 18 U.S.C. 2251(a) and (e), and possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 18

TABLE OF AUTHORITIES

Cases:

Barnes v. *United States*, 142 S. Ct. 2754 (2022) 8
Cohen v. *United States*, 144 S. Ct. 165 (2023) 8
Courtade v. *United States*, 140 S. Ct. 907 (2020) 8
Delaware v. *Pennsylvania*, 598 U.S. 115 (2023) 8
Fernandez v. *United States*, 141 S. Ct. 2865 (2021) 8
Gace v. *United States*, 142 S. Ct. 2877 (2022) 8
Holmes v. *United States*, 580 U.S. 917 (2016) 8
Knox v. *United States*, 510 U.S. 939 (1993) 11
Miller v. *United States*, 582 U.S. 933 (2017) 8
New York v. *Ferber*, 458 U.S. 747 (1982) 10, 11
Pepper v. *United States*, 562 U.S. 476 (2011) 18
Rockett v. *United States*, 140 S. Ct. 484 (2019) 8
United States v. *Amirault*, 173 F.3d 28 (1st Cir. 1999) 12
United States v. *Anthony*, No. 21-2343, 2022 WL 17336206 (3d Cir. Nov. 30, 2022), cert. denied, 2024 WL 674888 (2024) 15
United States v. *Arvin*, 900 F.2d 1385 (9th Cir. 1990), cert. denied, 498 U.S. 1024 (1991) 11
United States v. *Clawson*, No. 22-4141, 2023 WL 3496324 (4th Cir. May 17, 2023) 15

Cases—Continued: Page

United States v. *Close*, No. 21-1962, 2022 WL 17086495 (2d Cir. Nov. 21, 2022), cert. denied, 143 S. Ct. 1043 (2023) 15
United States v. *Courtade*, 929 F.3d 186 (4th Cir. 2019), as amended (July 10, 2019), cert. denied, 140 S. Ct. 907 (2020) 15, 16
United States v. *Donoho*, 76 F.4th 588 (7th Cir. 2023), petition for cert. pending, No. 23-803 (filed Jan. 23, 2024) 15
United States v. *Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), affirmed *sub nom. United States* v. *Wiegand*, 812 F.2d 1239 (9th Cir.), cert. denied, 484 U.S. 856 (1987) 4, 5, 12
United States v. *Finley*, 726 F.3d 483 (3d Cir. 2013), cert. denied, 574 U.S. 902 (2014) 9, 10, 15
United States v. *Frabizio*, 459 F.3d 80 (1st Cir. 2006) 11
United States v. *Goodman*, 971 F.3d 16 (1st Cir. 2020) 15
United States v. *Hansen*, 599 U.S. 762 (2023) 13
United States v. *Heinrich*, 57 F.4th 154 (3d Cir. 2023) 16
United States v. *Hillie*:
38 F.4th 235 (D.C. Cir. 2022) 13-15, 18
39 F.4th 674 (D.C. Cir. 2022) 14, 17
United States v. *Hodge*, 805 F.3d 675 (6th Cir. 2015) 16
United States v. *Holmes*, 814 F.3d 1246 (11th Cir.), cert. denied, 580 U.S. 917 (2016) 15
United States v. *Hunter*, 720 Fed. Appx. 991 (11th Cir. 2017) 17
United States v. *Knox*, 32 F.3d 733 (3d Cir. 1994), cert. denied, 513 U.S. 1109 (1995) 11
United States v. *Larkin*, 629 F.3d 177 (3d Cir. 2010), cert. denied, 565 U.S. 908 (2011) 12

Cases—Continued: Page

United States v. *McCall*, 833 F.3d 560 (5th Cir. 2016), cert. denied, 580 U.S. 1076 (2017) 16
United States v. *Miller*, 829 F.3d 519 (7th Cir. 2016), cert. denied, 582 U.S. 933 (2017) 11, 15, 16
United States v. *Perkins*, 850 F.3d 1109 (9th Cir. 2017) 16
United States v. *Petroske*, 928 F.3d 767 (8th Cir. 2019), cert. denied, 140 S. Ct. 973 (2020) 16
United States v. *Sheehan*, 70 F.4th 36 (1st Cir. 2023) 16
United States v. *Sims*, 708 F.3d 832 (6th Cir. 2013) 13
United States v. *Spoor*, 904 F.3d 141 (2d Cir. 2018), cert. denied, 139 S. Ct. 931 (2019) 15, 16
United States v. *Vallier*, 711 Fed. Appx. 786 (6th Cir.), cert. denied, 139 S. Ct. 442 (2018) 15
United States v. *Ward*, 686 F.3d 879 (8th Cir. 2012) 15
United States v. *Wells*, 843 F.3d 1251 (10th Cir. 2016), cert. denied, 583 U.S. 830 (2017) 10, 15, 16
United States v. *Williams*, 553 U.S. 285 (2008) 10
Vallier v. *United States*, No. 23-1214, 2023 WL 5676909 (6th Cir. Aug. 2, 2023) 15
Wells v. *United States*, 583 U.S. 830 (2017) 8

Constitution and statutes:

U.S. Const. Amend. I 10
Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299, § 7(c)(1), 132 Stat. 4389 4
18 U.S.C. 2251 ..... 3, 8, 9
18 U.S.C. 2251(a) 2, 3, 8, 9, 18
18 U.S.C. 2251(e) 2, 3, 8, 15, 18

Statutes—Continued: Page

18 U.S.C. 2252A(a)(5)(B) 2, 3, 18
18 U.S.C. 2252A(b)(2) 2, 3, 18
18 U.S.C. 2256(2)(A) (2012) 4
18 U.S.C. 2256(2)(A)(v) (2012) 7, 8
18 U.S.C. 2256(8)(A) 3

Miscellaneous:

The Oxford English Dictionary (2d ed. 1989):
Vol. 5 9
Vol. 8 9
Lawrence A. Stanley, *The Child Porn Storm*, Washington Post, Jan. 30, 1994 11

In the Supreme Court of the United States

No. 23-625

TEL JAMES BOAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 69 F.4th 601. Another opinion of the court of appeals (Pet. App. 28a-37a) is not published in the Federal Reporter but is available at 2023 WL 3722904.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 2023. A petition for rehearing was denied on September 8, 2023 (Pet. App. 40a-41a). The petition for a writ of certiorari was filed on December 7, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Idaho, petitioner was convicted on 16 counts of attempting to sexually exploit a minor,

in violation of 18 U.S.C. 2251(a) and (e), and one count of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2). Judgment 1; Indictment 1, 9. He was sentenced to 45 years of imprisonment, to be followed by a life term of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-37a.

1. From 2012 to 2019, petitioner lived with his wife and her two minor children, who became his stepchildren. Pet. App. 5a-6a. During the summer of 2018, petitioner instructed his stepdaughter, who was 14 years old at the time, "'always'" "to shower in the master bathroom located through a closet in [petitioner's] bedroom," even though the "house had three bathrooms that contained showers." *Id.* at 7a; see 9/9/21 Tr. 387-392 (C.A. E.R. 480-485). Unbeknownst to her, petitioner had set up a secret camera "that looked like a phone charger, which could be motion-activated or switched on manually." Pet. App. 7a. The camera was "positioned close to the shower, framing the shower as the center of the shot." *Ibid.* "The camera worked by sending data wirelessly to a cellphone via an app called BVCAM," which "permits the user to watch a live video feed, as well as record and store videos." *Id.* at 8a.

In fall of 2019, petitioner's wife "was searching through [petitioner's] iPhone without his knowledge when she noticed" the BVCAM application. Pet. App. 6a. After opening it, she discovered "nude videos of [her 14-year-old daughter] in the master bathroom of their home." *Ibid.* She contacted law enforcement, who secured search warrants for petitioner's cellphones, electronic devices, and Apple iCloud account. *Ibid.* Petitioner's iCloud account contained 37 videos of the victim in the bathroom "in various stages of undress." *Ibid.*

The videos "prominently feature [the victim] when she is fully nude before, during, and after showering." *Id.* at 7a. She "is generally in the center of the videos, and her genitals and pubic area are visible and exposed to the camera as she showers and otherwise uses the bathroom." *Ibid.* In addition, "[b]ecause the shower curtain is transparent, [her] nude body remains visible when she is showering." *Ibid.* "Although people other than [the victim] regularly used the master bathroom, the videos in [petitioner's] iCloud account only showed [her]." *Ibid.* Petitioner also attempted to rape his stepdaughter in November 2018, and did in fact rape her in 2019. *Id.* at 8a; see 9/9/21 Tr. 397-404, 407-410 (C.A. E.R. 490-497, 500-503).

2. A federal grand jury in the District of Idaho indicted petitioner on 16 counts of attempting to sexually exploit a minor, in violation of 18 U.S.C. 2251(a) and (e), and one count of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2). Indictment 1-9.

a. Section 2251 prohibits, among other things, "us[ing]" a minor to engage in "sexually explicit conduct" for the purpose of producing a visual depiction. 18 U.S.C. 2251(a). Section 2252A(a)(5)(B) prohibits, among other things, "knowingly possess[ing] * * * child pornography." 18 U.S.C. 2252A(a)(5)(B). Child pornography is defined to encompass "any visual depiction" where "the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct." 18 U.S.C. 2256(8)(A).

For purposes of Section 2251(a) and 2256(8)(A), "'sexually explicit conduct' means actual or simulated" "(i) sexual intercourse," "(ii) bestiality," "(iii) masturbation," "(iv) sadistic or masochistic abuse," or "(v) lasciv-

ious exhibition of the genitals or pubic area of any person." 18 U.S.C. 2256(2)(A) (2012); see Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299, § 7(c)(1), 132 Stat. 4389 (adding "anus" to subparagraph (v)). At trial, the government relied on subparagraph (v), arguing that the videos depicted a lascivious exhibition of the victim's genitals or pubic area. See Pet. App. 11a. The jury saw the videos that petitioner surreptitiously recorded in the master bathroom and heard testimony from the victim, her mother (petitioner's wife), and several law enforcement officers. *Id.* at 7a-9a. Petitioner also testified. *Id.* at 8a-9a.

b. Petitioner moved for a judgment of acquittal, asserting (among other things) that the government's evidence was insufficient to allow a reasonable jury to find that the videos depicted "sexually explicit conduct." Pet. App. 9a; see 9/9/21 Tr. 547-549, 552-553 (C.A. E.R. 640-642, 645-647). Petitioner contended that the videos instead depicted merely "hygienic procedures." *Id.* at 548 (C.A. E.R. 641); see *id.* at 552-553 ("[A]ll I watched for 16 counts was a young girl take a shower.").

The district court denied the motion. 9/9/21 Tr. 553-557 (C.A. E.R. 646-650); see 9/20/21 Tr. 847 (C.A. E.R. 944). The court looked to the factors articulated in *United States* v. *Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), affirmed *sub nom. United States* v. *Wiegand*, 812 F.2d 1239 (9th Cir.), cert. denied, 484 U.S. 856 (1987), to guide the inquiry. 9/9/21 Tr. 555 (C.A. E.R. 648). Those factors consider (1) whether "the focal point" of the depiction "is on the child's genitalia or pubic area," (2) whether the depiction is "sexually suggestive," (3) whether "the child is depicted in an unnatural pose, or in inappropriate attire," (4) whether "the child is fully

or partially clothed, or nude," (5) whether the depiction "suggests sexual coyness or a willingness to engage in sexual activity," and (6) whether the depiction "is intended or designed to elicit a sexual response in the viewer." *Dost*, 636 F. Supp. at 832. The court noted that it found four such considerations "applicable here," 9/9/21 Tr. 555 (C.A. E.R. 648), and determined that the government had produced sufficient evidence to submit the charges to the jury, *id.* at 557 (C.A. E.R. 650).

The district court instructed the jury that "whether a picture or image of the genitals or pubic area constitutes * * * a lascivious exhibition requires the consideration of the overall context of the material." 9/20/21 Tr. 863-864 (C.A. E.R. 960-961). The court informed the jury that "[i]n making that determination," the jury "may consider" the six *Dost* factors. *Id.* at 864 (C.A. E.R. 961). The court told the jury that "[t]he picture or image need not involve all of these factors to constitute a lascivious exhibition of the genitals or pubic area of any person," and that "[t]he weight or lack of weight which you give to any of these factors is for you to decide." *Ibid.* The court also informed the jury that, in order to find petitioner guilty of "attempting to commit the crime of sexual exploitation of a child, the Government must prove beyond a reasonable doubt that [petitioner] did something that was a substantial step towards committing the crime of sexual exploitation of a child and that strongly corroborated [petitioner]'s intent to commit that crime." *Id.* at 861 (C.A. E.R. 958).

c. The jury found petitioner guilty on all 16 counts of attempting to sexually exploiting a minor and the one count of possessing child pornography. Pet. App. 9a; 9/20/21 Tr. 940-941 (C.A. E.R. 1037-1038). At sentencing, the district court emphasized that petitioner had

"shown a lack of remorse" and "denial of criminal responsibility," and that "we have a victim here who was most vulnerable—not only by her age, early teenage years, but also by her relationship with her stepfather." 12/14/21 Sent. Tr. 58 (C.A. E.R. 1104). The advisory guidelines called for the sentences on each count to run consecutively to the others. *Id.* at 38. The court sentenced petitioner to the statutory maximum of 30 years of imprisonment on each of the 16 attempted-sexual-exploitation counts, to be served concurrently with each other, and 15 years of imprisonment on the possession count, to be served consecutively to his sentence on the other counts, for a total of 45 years of imprisonment, to be followed by a life term of supervised release. *Id.* at 61-62; Judgment 2-3.

4. The court of appeals affirmed. Pet. App. 1a-27a; see *id.* at 28a-37a.

The court of appeals found, viewing the evidence in the light most favorable to the verdict, that "sufficient evidence existed for a rational jury to find beyond a reasonable doubt that the videos [of the victim] contain sexually explicit conduct." Pet. App. 14a. And even on a de novo standard of review of the district court's view of the evidence, the court of appeals agreed with the district court's rejection of petitioner's contention that the videos contained only depictions that were "'strictly hygienic' and 'not sexual in nature.'" *Ibid.*

Recognizing that the "*Dost* factors 'are neither exclusive nor conclusive,' but rather 'general principles as guides for analysis,'" the court of appeals noted that a reasonable jury could find that the videos here satisfied the first, fourth, and sixth factors. Pet. App. 16a (citation omitted); see *id.* at 17a-21a. As to the first factor, the court observed that, based on the camera's position-

ing and distance from the shower, "the focal point of the videos was [the victim's] genitals or pubic area." *Id.* at 17a; see *id.* at 17a-19a. As to the fourth factor, the court observed that it was "undisputed that [the victim] is fully nude in the videos." *Id.* at 19a. And as to the sixth factor, the court observed that "the videos were intended or designed to elicit a sexual response in the viewer," given that petitioner "instructed [the victim] to shower in the very bathroom where he had placed the secret shower-facing camera" and then "selectively saved nude videos" only of the victim, even though the motion-activated camera would have captured all users of the bathroom. *Id.* at 19a-20a. The court also noted petitioner's "sexual interest in" the victim, as evidenced by admissible evidence that petitioner "attempted to rape her a few months after the videos were recorded and that he did rape her a few months after that." *Id.* at 20a-21a.

The court of appeals recognized that, "[t]o satisfy its burden for the sixteen counts of attempted sexual exploitation under § 2251(a), the government needed only to prove beyond a reasonable doubt that [petitioner] intended to and took a substantial step toward producing lascivious videos." Pet. App. 14a n.6. But because the court determined "that sufficient evidence supported a finding that the videos were lascivious," it did "not differentiate between the § 2251(a) attempt counts and the § 2252A completed count." *Ibid.*

ARGUMENT

Petitioner renews his contention (Pet. 11-31) that the evidence is insufficient to support the jury's finding that the videos depict a "lascivious exhibition of the genitals or pubic area" under 18 U.S.C. 2256(2)(A)(v) (2012). The court of appeals correctly rejected that contention,

and its decision does not conflict with any decision of this Court. And although the courts of appeals have relied to varying degrees on the *Dost* factors, any disagreement is narrow. This Court has repeatedly and recently denied petitions for certiorari raising similar issues—including most recently in *Anthony* v. *United States*, No. 23-5566 (Feb. 20, 2024)—and the same course is warranted here.[1]

1. The court of appeals correctly rejected petitioner's challenge to the sufficiency of the evidence.

a. Under Section 2251, "[a]ny person who," *inter alia*, "employs, uses, persuades, induces, entices, or coerces any minor to engage in * * * any sexually explicit conduct for the purpose of producing any visual depiction of such conduct," or any person who attempts to do so, is subject to criminal penalties. 18 U.S.C. 2251(a) and (e). The statute defines "sexually explicit conduct" to include, as relevant here, "actual or simulated * * * lascivious exhibition of the genitals or pubic area" of a minor. 18 U.S.C. 2256(2)(A)(v) (2012).

The statute does not define "lascivious exhibition," which accordingly should take its ordinary meaning. See, *e.g.*, *Delaware* v. *Pennsylvania*, 598 U.S. 115, 128

---

[1] See, *e.g.*, *Cohen* v. *United States*, 144 S. Ct. 165 (2023) (No. 22-7818); *Gace* v. *United States*, 142 S. Ct. 2877 (2022) (No. 21-7259); *Barnes* v. *United States*, 142 S. Ct. 2754 (2022) (No. 21-6934); *Fernandez* v. *United States*, 141 S. Ct. 2865 (2021) (No. 20-7460); *Courtade* v. *United States*, 140 S. Ct. 907 (2020) (No. 19-428); *Rockett* v. *United States*, 140 S. Ct. 484 (2019) (No. 18-9411); *Wells* v. *United States*, 583 U.S. 830 (2017) (No. 16-8379); *Miller* v. *United States*, 582 U.S. 933 (2017) (No. 16-6925); *Holmes* v. *United States*, 580 U.S. 917 (2016) (No. 15-9571). Other pending petitions for writs of certiorari present similar questions. See, *e.g.*, *Kolhoff* v. *United States*, No. 23-6481 (filed Jan. 2, 2024); *Donoho* v. *United States*, No. 23-803 (filed Jan. 23, 2024).

(2023). The word "lascivious" means "[i]nciting to lust or wantonness." 8 *The Oxford English Dictionary* 667 (2d ed. 1989). And "exhibition" means a "visible show or display." 5 *The Oxford English Dictionary* 537 (2d ed. 1989). Here, a rational juror could determine that the videos petitioner surreptitiously took of his stepdaughter before, during, and after her showers constituted a visible display designed to incite petitioner's lust.

Petitioner contends that "lascivious exhibition" "must * * * involve, at a minimum, an 'explicitly portrayed' sexual or sexually suggestive display of private parts." Pet. 24 (citation omitted); see Pet. 21-26. And because the victim "depicted in the videos here 'never engages in any sexual conduct whatsoever, or any activity connoting a sex act,'" petitioner contends that "'no rational trier of fact could find her conduct depicted in the videos to be a "lascivious exhibition of the genitals."'" Pet. 25-26 (brackets, citation, and ellipses omitted). Petitioner's focus on the minor's conduct is misplaced.

Although Section 2251 refers to depictions in which a minor "engage[s] in * * * any sexually explicit conduct," the focus of the statutory prohibition is on the defendant's own behavior: he must not "employ[], use[], persuade[], induce[], entice[], or coerce[] any minor to engage in" such conduct. 18 U.S.C. 2251(a). Thus, "a perpetrator can 'use' a minor to engage in sexually explicit conduct without the minor's conscious or active participation." *United States* v. *Finley*, 726 F.3d 483, 495 (3d Cir. 2013), cert. denied, 574 U.S. 902 (2014).

Indeed, because "lascivious" modifies "exhibition," "lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer

sets up for * * * himself or like-minded pedophiles." *United States* v. *Wells*, 843 F.3d 1251, 1255 (10th Cir. 2016) (brackets, citation, and emphases omitted), cert. denied, 583 U.S. 830 (2017). Petitioner's contrary reading would implausibly narrow the statute by requiring a child victim to display a lustful manner even if she is unaware that she is being filmed, or too young to express sexual desire, or perhaps even unconscious or drugged. See *Finley*, 726 F.3d at 495.

Petitioner's reliance (Pet. 24-25) on *United States* v. *Williams*, 553 U.S. 285 (2008), and *New York* v. *Ferber*, 458 U.S. 747 (1982), is misplaced. While the Court's decision in *Williams*, which rejected a First Amendment overbreadth challenge, described "'sexually explicit conduct'" as "connot[ing] actual depiction of the sex act rather than merely the suggestion that it is occurring," 553 U.S. at 297 (emphasis omitted), it recognized that the statutory definition of "sexually explicit conduct" includes "lascivious exhibition of the genitals," *id.* at 301 (citation omitted), making such exhibition in itself a "sex act." Nor does *Williams*'s reference to "a harmless picture of a child in a bathtub," *ibid.*, foreclose application of the statutory definition to surreptitious videos like the ones here, which are anything but harmless to the victims, cf. Pet. App. 7a; 12/14/21 Sent. Tr. 58. Its application is likewise not foreclosed by the Court's statement in *Ferber* that "the nature of the harm to be combated requires that [a] state offense" proscribing child pornography "be limited to works that *visually* depict sexual conduct by children below a specified

age," 458 U.S. at 764. Under the statutory definition, the videos here are such visual depictions.[2]

b. As the courts of appeals generally have recognized, whether a depiction constitutes a lascivious exhibition of the genitals or pubic area of a child is a question for the factfinder, to be determined using common sense. See, *e.g.*, *United States* v. *Miller*, 829 F.3d 519, 525 (7th Cir. 2016) (leaving the question "to the factfinder to resolve, on the facts of each case, applying common sense") (citation omitted), cert. denied, 582 U.S. 933 (2017); *United States* v. *Frabizio*, 459 F.3d 80, 85 (1st Cir. 2006) ("'Lascivious' is a 'commonsensical term,' and whether a given depiction is lascivious is a question of fact for the jury.") (citation omitted); *United States* v. *Arvin*, 900 F.2d 1385, 1390 (9th Cir. 1990) (describing "lascivious[ness]" as a "'commonsensical term'" and "a determination that lay persons can and should make") (citation omitted), cert. denied, 498 U.S. 1024 (1991).

---

[2] Petitioner observes (Pet. 23) that the government's brief in *Knox* v. *United States*, 510 U.S. 939 (1993), stated that "the material must depict a child lasciviously engaging in sexual conduct (as distinguished from lasciviousness on the part of the photographer or consumer)," U.S. Br. at 9, *Knox*, *supra* (No. 92-1183). But that case presented the separate question whether the statute encompassed depictions of fully clothed children, see *id.* at I; the arguments in that brief were quickly repudiated, see Lawrence A. Stanley, *The Child Porn Storm*, Washington Post, Jan. 30, 1994, at C3 (recounting that President Clinton "denounced the reasoning of his own solicitor general" and that "[w]ithin a few weeks, the Senate had passed a unanimous, non-binding resolution condemning the [government's] brief"); and on remand from this Court, the Third Circuit reinstated the defendant's convictions in an opinion analyzing—and rejecting—the arguments in that brief, see *United States* v. *Knox*, 32 F.3d 733, 743-752 (1994), cert. denied, 513 U.S. 1109 (1995).

To "guide[]" the factfinder's common sense, Pet. App. 16a (citation omitted), lower courts generally instruct jurors on the six factors set forth in *United States* v. *Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), affirmed *sub nom. United States* v. *Wiegand*, 812 F.2d 1239 (9th Cir.), cert. denied, 484 U.S. 856 (1987). Those courts emphasize—as the lower courts did here—that the factors are "not dispositive and serve only as a guide." *United States* v. *Larkin*, 629 F.3d 177, 182 (3d Cir. 2010), cert. denied, 565 U.S. 908 (2011). Lower courts also emphasize that the inquiry is "always" "case-specific." *United States* v. *Amirault*, 173 F.3d 28, 32 (1st Cir. 1999).

Here, as the court of appeals explained, a rational juror could find that the videos satisfied the first, fourth, and sixth *Dost* factors. Pet. App. 17a-23a. On the first factor, the camera was positioned so that the victim's genitals and pubic area were the "focal point" of the videos, such that they were "highly exposed for substantial periods of time," *id.* at 18a; on the fourth, the videos showed the victim fully nude, *id.* at 19a; and on the sixth, "there [wa]s a striking amount of evidence that [petitioner] produced the videos to elicit a sexual response," *id.* at 22a; see *id.* at 20a-21a (recounting the evidence, including that petitioner "curated" and "selectively saved nude videos" of the victim, "instructed" the victim to shower in the bathroom with the camera, and "attempted to rape her a few months after the videos were recorded" and "did rape her a few months after that").

c. At a minimum, as the court of appeals observed, 16 of the 17 counts on which petitioner was convicted were for attempted sexual exploitation, which requires only proof that the defendant "intended to and took a substantial step toward producing lascivious videos,"

not actual completion of the offense. Pet. App. 14a n.6; see, *e.g.*, *United States* v. *Hansen*, 599 U.S. 762, 774-775 (2023) (describing an attempt offense). Accordingly, a defendant may be found guilty of attempting to create a visual depiction containing a lascivious exhibition whether or not the depiction ultimately contains such an exhibition. See, *e.g.*, *United States* v. *Sims*, 708 F.3d 832, 835 (6th Cir. 2013) ("To convict [the defendant] of attempted production of child pornography, the government does not need to prove that the videos of [the minor] were actually lascivious.").

Petitioner's conclusory assertion that the government "introduced no evidence" as to his intent, Pet. 26 (citation omitted), lacks merit. Considerable evidence supported the jury's findings that petitioner intended to create visual depictions of the victim engaging in a lascivious exhibition of her genitals or pubic area and took substantial affirmative steps to further that goal. Petitioner deceived the victim into using the master bathroom to shower (even though there were other showers in the house), deliberately set up and aimed a disguised camera at the shower, curated the videos to save only those videos containing depictions of the victim, and demonstrated his sexual interest in the victim by attempting to rape her and then actually raping her just months after taking the videos. See pp. 2-3, *supra*.

Those circumstances amply support the findings that petitioner's "interest in the girl[] was sexual," *United States* v. *Hillie*, 38 F.4th 235, 241 n.1 (D.C. Cir. 2022) (per curiam) (Katsas, J., concurring in the denial of rehearing en banc), and that petitioner took many substantial steps toward the completion of the offenses. Just as one can "readily infer" from a defendant's surreptitious recording of toilet activity that his "interest"

in the victim is "sexual, not sartorial or urological," *ibid.*, a jury could readily infer that petitioner's intent here was to obtain videos that fit even his own narrow definition of "lascivious exhibition." Any failure to capture such images would suggest only that his efforts were unsuccessful—not that he never tried.

2. Petitioner contends (Pet. 12-18) that the decision below conflicts with a recent decision by the D.C. Circuit, and claims (Pet. 18-21) the lower courts are divided on when and how to use the *Dost* factors. But any disagreements in the courts of appeals on those issues are narrow, nascent, and do not warrant this Court's review.

a. In *United States* v. *Hillie*, 39 F.4th 674 (2022), a divided panel of the D.C. Circuit interpreted the phrase "lascivious exhibition" in Section 2256(2)(A)(v) to require the minor victim to display her "genitalia[] or pubic area in a manner connoting that the minor, or any person or thing appearing with the minor in the image, exhibits sexual desire or an inclination to engage in any type of sexual activity," *id.* at 685 (emphasis omitted). But *Hillie* is an outlier, and any conflict with the decision below does not warrant this Court's review. And even if review of the circuit disagreement were otherwise warranted, it would be premature, because the practical effect of *Hillie* remains unclear.

Both before[3] and after[4] Hillie, other courts of appeals have upheld "lascivious exhibition" convictions where a defendant secretly recorded an unsuspecting minor who was sleeping, undressing to change clothes, using the toilet, or taking a shower. And even in the D.C. Circuit, conduct of that nature would be sufficient to support a conviction for attempt under 18 U.S.C. 2251(e), which does not turn on the actual image produced. See *Hillie*, 38 F.4th at 241 n.1 (Katsas, J., concurring in the denial of rehearing en banc) (observing that an attempt conviction could be supportable when a defendant "surreptitiously record[s] girls 'by hiding a video camera in the bathroom,'" because "a jury could readily infer that his interest in the girls [i]s sexual, not sartorial or urological.") (citation omitted). Thus, at a minimum, petitioner has not identified any court of appeals that would over-

---

[3] See, *e.g.*, *United States* v. *Goodman*, 971 F.3d 16, 19 (1st Cir. 2020); *United States* v. *Spoor*, 904 F.3d 141, 146-150 (2d Cir. 2018), cert. denied, 139 S. Ct. 931 (2019); *Finley*, 726 F.3d at 494-495 (3d Cir.); *United States* v. *Courtade*, 929 F.3d 186, 191-193 (4th Cir. 2019), cert. denied, 140 S. Ct. 907 (2020); *United States* v. *Vallier*, 711 Fed. Appx. 786, 788 (6th Cir.) (per curiam), cert. denied, 139 S. Ct. 442 (2018); *Miller*, 829 F.3d at 523-526 (7th Cir.); *United States* v. *Ward*, 686 F.3d 879, 881-884 (8th Cir. 2012); *Wells*, 843 F.3d at 1254-1257 (10th Cir.); *United States* v. *Holmes*, 814 F.3d 1246, 1248-1252 (11th Cir.), cert. denied, 580 U.S. 917 (2016).

[4] See, *e.g.*, *United States* v. *Close*, No. 21-1962, 2022 WL 17086495, at *1-*2 & n.2 (2d Cir. Nov. 21, 2022), cert. denied, 143 S. Ct. 1043 (2023); *United States* v. *Anthony*, No. 21-2343, 2022 WL 17336206 (3d Cir. Nov. 30, 2022), cert. denied, 2024 WL 674888 (2024); *United States* v. *Clawson*, No. 22-4141, 2023 WL 3496324, at *1-2 (4th Cir. May 17, 2023) (per curiam); *Vallier* v. *United States*, No. 23-1214, 2023 WL 5676909, at *3 (6th Cir. Aug. 2, 2023); *United States* v. *Donoho*, 76 F.4th 588, 599-600 (7th Cir. 2023), petition for cert. pending, No. 23-803 (filed Jan. 23, 2024).

turn his 16 counts of conviction for attempting to sexually exploit a minor.

b. Similarly, any disagreement among the courts of appeals about the relevance and use of the *Dost* factors is narrow and does not warrant this Court's review—especially given courts' uniform agreement that the *Dost* factors provide, at most, only a non-exhaustive guide for the factfinder to determine whether a particular depiction constitutes a lascivious exhibition.

Seven courts of appeals endorse the *Dost* factors as a nondispositive aid in determining whether a visual depiction is lascivious. See, *e.g.*, *United States* v. *Spoor*, 904 F.3d 141, 150-151 & n.9 (2d Cir. 2018), cert. denied, 139 S. Ct. 951 (2019); *United States* v. *Heinrich*, 57 F.4th 154, 161 (3d Cir. 2023); *United States* v. *McCall*, 833 F.3d 560, 563 (5th Cir. 2016), cert. denied, 580 U.S. 1076 (2017); *United States* v. *Hodge*, 805 F.3d 675, 680 (6th Cir. 2015); *United States* v. *Petroske*, 928 F.3d 767, 773-774 (8th Cir. 2019), cert. denied, 140 S. Ct. 973 (2020); *United States* v. *Perkins*, 850 F.3d 1109, 1121 (9th Cir. 2017); *Wells*, 843 F.3d at 1253 (10th Cir.).

Four circuits have declined to take a definitive stance on the *Dost* factors, even while recognizing their utility. See, *e.g.*, *United States* v. *Sheehan*, 70 F.4th 36, 46 n.4 (1st Cir. 2023) ("We caution that although we find these factors 'generally relevant' and useful for the guidance they provide, they are 'neither comprehensive nor necessarily applicable in every situation.'") (citation omitted); *United States* v. *Courtade*, 929 F.3d 186, 192 (4th Cir.) (explaining that the court "need not venture into the thicket surrounding the *Dost* factors" because the depiction of a young girl showering objectively constituted a lascivious exhibition), cert. denied, 140 S. Ct. 907 (2020); *Miller*, 829 F.3d at 525 n.1 (7th Cir.) (ex-

plaining that the court "ha[s] discouraged * * * mechanical application" of the *Dost* factors, but declining to adopt or reject them); *United States* v. *Hunter*, 720 Fed. Appx. 991, 996 (11th Cir. 2017) (per curiam) (noting that the court's published decisions had not resolved "whether *Dost* applies in this circuit," but applying the *Dost* factors because "both Defendant and the Government use [them] in analyzing this question").

Only the D.C. Circuit has definitively "decline[d] to adopt the *Dost* factors." *Hillie*, 39 F.4th at 689. Yet even then, the court clarified that it "do[es] not mean to suggest that evidence concerning all matters described in the factors is irrelevant or inadmissible at trial." *Ibid.* Thus, although courts of appeals differ on whether they expressly adopt the *Dost* factors, they do generally agree that a jury may consider aspects of the depiction that those factors encompass. And given that the district court in this case expressly instructed the jury that it must consider the "overall context of the material" and that "[t]he weight or lack of weight which you give to any of [the *Dost*] factors is for you to decide, 9/20/21 Tr. 863-864 (C.A. E.R. 960-961), this case would be a poor vehicle in which to address any disagreement about the proper consideration of those factors.

3. The inchoate nature of most of petitioner's counts of conviction is a further reason why it is unsuitable for further review. As noted above, 16 of the 17 counts on which petitioner was convicted were for attempted sexual exploitation of a minor, which does not require proof that the recordings actually depicted a lascivious exhibition. See pp. 12-14, *supra*. And although the possession count does require proof of that element, the district court was clear that petitioner's conduct merited a lengthy sentence, and therefore might well impose the

same below-guidelines 45-year sentence even if petitioner were to prevail on his challenge to the possession conviction. See 12/14/21 Sent. Tr. 58-62; cf. *Pepper* v. *United States*, 562 U.S. 476, 487-488 (2011) (explaining that "the punishment should fit the offender and not merely the crime") (citation omitted).

More broadly, attempted sexual exploitation of a minor under Section 2251(a) and attempted possession of child pornography under Section 2252A(a)(5)(B) carry the same penalties as the completed offenses do. See 18 U.S.C. 2251(e), 2252A(b)(2). And as this case illustrates, the evidence presented in a surreptitious-recording case generally will support a conviction for attempted production or possession of child pornography irrespective of the meaning of "lascivious exhibition." Cf. *Hillie*, 38 F.4th at 241 n.1 (Katsas, J., concurring in the denial of rehearing en banc). Accordingly, as a practical matter the importance of both the question presented and the lopsided circuit conflict with respect to completed offenses likely will diminish.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
NICOLE M. ARGENTIERI
Acting Assistant Attorney General
PAUL T. CRANE
Attorney

MARCH 2024